

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



*Corrected - 7/22/97

Application No. 15837 of George Washington University, as amended, pursuant to 11 DCMR 3108.1 and 3107.2, for a special exception under Section 210 for further processing of an approved campus plan, or, in the alternative, special exceptions under Sections 210 and 411 for further processing of an approved campus plan and a roof structure, and a variance from the lot occupancy requirements (Subsection 403.2) to allow an addition to an existing university building containing a student center, offices, theater, dining room and dormitory in an R-5-D District at premises 800 21st Street, and 2100 I Street, N.W. (Square 77, Lots 7 and 58).

HEARING DATES: July 21, 1993; September 2, 1993; January 12, 1994
and January 26, 1994

DECISION DATES: March 2, 1994 and April 6, 1994

DISPOSITION: The Board GRANTED the application by a vote of 5-0
(John G. Parsons, Craig Ellis, George Evans, Laura
M. Richards and Angel F. Clarens to grant)

FINAL DATE OF ORDER: January 31, 1997

ORDER DENYING MOTION FOR RECONSIDERATION

The Board granted the application subject to six conditions by its order dated January 31, 1997. By letter dated February 25, 1997 Advisory Neighborhood Commission (ANC) 2A requested an extension of time to file a response to the Board's final order dated January 31, 1997. The ANC explained that the appropriate commissioner had difficulty receiving the order in a timely fashion. Therefore, an extension was necessary to allow for a proper response.

At its Public Meeting of March 5, 1997, the Board approved the extension of time by a vote of 3-0 (Angel F. Clarens and Laura M. Richards to approve; John G. Parsons to approve by absentee vote; Sheila Cross Reid and Susan Morgan Hinton not voting, not having heard the case).

On March 17, 1997, Advisory Neighborhood Commission (ANC) 2A (movant) filed a request for reconsideration of the decision. The applicant, George Washington University (respondent) filed a statement in response to the applicant's motion on March 24, 1997.

First, the ANC argued that the Board erred in concluding in the order that "the applicant has met the burden of proof for variance relief from the lot occupancy requirements of Subsection 403.2" The ANC pointed out that the Marvin Center building was

originally approved in 1967. At that time the Board did not consider the percentage of lot occupancy. The Zoning Regulations in effect at that time did not require a lot occupancy variance at this site. Therefore, the ANC maintains that it was improper for the Board to state that the lot occupancy of 85.8 percent was approved by the Board in 1967. The ANC argued that the question of lot occupancy must be considered de novo.

Also with regard to lot occupancy, the ANC argued that the University combined two record lots (the Marvin Center lot and the adjacent lot) and, in an attempt to further circumvent the density requirements, the University also proposed to construct a "Small canopy" between the Marvin Center and Adams Hall to make one building out of the two structures. The ANC contends that these buildings should not be considered as one because a small canopy is not materially distinguishable from a single paved walk at ground level, and such a walk would not be sufficient to combine two separate structures into a single building for zoning purposes. The ANC argued that the Board should have considered the Marvin Center as a separate building from the Adams Dormitory building, each of which must separately comply with the Zoning Regulations.

In its response, the University noted that in reviewing the motion, the Board is to consider the following:

1. Whether the Motion raises any materially different issues or provides any evidence of a substantive nature that the Board has not previously considered and addressed in its Final Order;
2. Whether the Motion states any specific erroneous findings made by the Board relevant to its final decision;
3. Whether any new evidence has been proffered which could not reasonably have been raised at the public hearing; and
4. Whether the Motion states how the Board erred in its decision, and whether it states the grounds for any error by the Board.

The University stated that the Motion must be based upon the record before the Board. Facts, circumstances and allegations which are beyond the scope of the record considered and acted upon by the Board are not a proper subject of a Motion for Reconsideration. The University argued that the ANC's Motion fails each of these tests and therefore, should be denied.

On the issue of lot occupancy, the University argued that the ANC did not raise at the hearing the specific issue which they seek

to raise now in the motion, i.e. whether the Board made "an erroneous application of the Zoning Regulations to permit measuring lot occupancy on the basis of combining the Marvin Center with a previously-existing adjacent building on a newly consolidated record lot." The ANC's position in its Amended Report was that, while the applicant had properly applied for a lot occupancy variance, "the proposed addition also requires a variance from the prohibition on an addition to a nonconforming structure." The ANC also claimed that the applicant did not meet its burden of proof for the variance. The University argued that this new allegation in the motion of an "erroneous application" is beyond the scope of the record considered and acted upon by the Board, and is therefore not properly before the Board.

Even assuming that the ANC's allegation of error on the "erroneous application" issue is properly before the Board, the University maintains that it is without merit. The University argued that the ANC's Motion reflects their unfamiliarity with the long-standing interpretation by the Zoning Administrator and this Board that a covered connection between two buildings above grade renders them a single building for zoning purposes, which must be located on a single record lot. Because of this, the lot occupancy for the connected buildings is based upon the single record lot and the single building.

The University stated that there are examples throughout the city where such covered connections have resulted in a single building for zoning purposes, on a single record lot. Because this is a matter of right issue, no variance is required, and this issue would not normally come before the Board in that context.

Secondly, the University addressed the ANC's argument regarding the Board's finding that the Marvin Center was built on former Record Lot 58 with a BZA-approval lot occupancy of 85.8 percent. The motion concedes that the existing Marvin Center was approved by the BZA in Appeal No. 9314-9315 dated October 9, 1967, but claims that the BZA did not specifically state the percentage of lot occupancy in its Order. The University stated that in the original Marvin Center application in 1967, the BZA approved a specific plan for a specific building. The building as shown on the approved plans, and as built, had a lot occupancy of 85.8 percent. This fact was conceded by the ANC at the hearing in the instant case. In his testimony to the Board on the lot occupancy issue then-Commissioner Kelly stated that the ANC's position as follows:

ANC-2A has three findings on this issue. First, the Marvin Center already exists, was built at a 3.84 FAR, and occupies 85.8 percent of the lot.

The University stated that the ANC has already made a specific finding on this issue. The ANC cannot now recant its testimony and change its position for the sake of convenience.

Whether the Board specifically referred to a specific number for lot occupancy in its 1967 Order, or instead approved a specific building plan which has a specific lot occupancy, is a distinction without a difference according to the University. The ANC's claim on this issue is not relevant to the Board's final decision in this case. Moreover, this is a new issue not raised by the ANC in the original proceeding, and is not now properly before the Board.

The University argued that these allegations by the ANC in its Motion were not previously raised to the Board. No new evidence has been proffered which could not reasonably have been raised at the public hearing. The ANC states no grounds for the alleged error, nor does it set forth any erroneous findings relevant to the Board's decision. Even if this issue were properly before the Board, the Motion should be denied on this matter for the reasons stated above.

The ANC's second main argument was that the Board failed to consider the direct impact that the additions to Marvin Center will have on off-campus housing. The ANC stated that the Board notes in its Summary of Evidence that "New construction within the court yard at the south elevation will provide an entrance lobby into the court directly from H Street." The ANC stated that the food court clearly provides an amenity, and thus encourages students to live off-campus. The ANC pointed out that this H Street entrance is in closest proximity to Foggy Bottom. The ANC argued that for the Board to give "great weight" to the recommendations of the ANC, the Board must consider whether the addition itself will increase pressure on the residential area.

The ANC expressed the concern that the expansion of the Marvin Center, with its increased student activity resources, will exacerbate severe problems caused in the off-campus neighborhood by the inadequacy of on-campus student housing. The ANC is also concerned that by expanding the Marvin Center, the University is consuming floor area which may be needed to meet the obligation to provide more student housing.

The ANC stated that while the Board recognized this issue, the Board deferred resolution of the issue to another case pending before the Board. The ANC maintains that it is entitled to a decision on this issue and cannot be forced to rely on the issues and facts raised in another case in which it may or may not be a party.

In response to these arguments, the University stated that the Board gave proper consideration to the ANC's position on residential integrity. The thrust of the ANC's argument is the desire to have the University construct additional student housing on campus. The University stated that in its final Order, the Board sets forth the concerns of the ANC in paragraph 28, including the ANC's concern that "the BZA should not process the subject application or any other applications for individual University projects until the University begins construction of an adequate number of residence hall beds on campus ..." (Paragraph 28C). At the public hearing, the Chairperson of this Board ruled that this issue was not relevant.

The University stated that notwithstanding the Board's ruling on lack of relevance, the Board responded to the ANC's specific concern on this issue, finding at Paragraph D on page 9 of the Order, that the proposed use and expansion of the Marvin Center are consistent with the approved Campus Plan, and that "there is another case pending before the Board, and this issue will be disposed of at that time." That case involved the construction of a new Residence Hall facility within the Campus Plan boundaries at 2350 H Street, N.W. ANC-2A was a party to that case, and registered its conditional support for the application. The Residence Hall project was approved by the BZA in Order No. 15930 on May 27, 1994, and was modified in Order No. 16036 on September 15, 1995.

The Board's public hearing in Application No. 15930 on the Residence Hall was held on March 23, 1994, just two months after the public hearing on the instant case. The ANC now claims in its motion that it is "entitled to a decision" in this case on the issue of construction of on-campus housing, and not "in another case in which it may not be a party." The University argued that this position by the ANC in its motion is disingenuous in light of its virtually contemporaneous participation in the on-campus housing application of which it now appears to claim no knowledge.

With regard to the issue of the H Street entrance to the food court encouraging off-campus housing, the University stated that this is a new argument that was not raised by the ANC during the Board's proceedings. The University stated that the argument assumes that students would flock to off-campus housing because they could walk into the Marvin Center from H Street, but that they would not be so inclined to live in off-campus housing if they had to use the 21st Street entrance to the Marvin Center a few steps away around the corner.

With regard to the issue of the Marvin Center exhausting campus-wide FAR available for housing, the University stated that the ANC did not raise this matter during the Board's proceedings. Moreover, even if it were raised, the Board concluded that the

proposed expansion of the Marvin Center is within the approved Campus Plan land use designation as "educational mixed-use." (See Order at page 9, Paragraph D.) The site is not designated for housing in the approved Campus Plan.

In conclusion, the University stated that the ANC's motion raises issues which are beyond the scope of the record considered and acted upon by the Board. To the extent that these same issues were raised below, they were adequately addressed by the Board. No new evidence has been proffered which could not reasonably have been raised at the public hearing. For these reasons and reasons stated above, the motion for reconsideration should be denied.

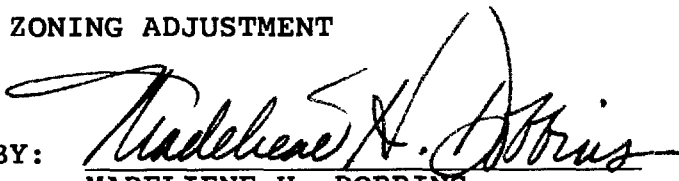
Upon consideration of the motion, the response thereto and the record in this case, the Board concludes that the motion failed to meet the test for extraordinary or changed circumstances. This motion is merely an effort to have the Board reweigh the evidence. The Board notes that the motion proports errors in the Boards analysis. However, the Board concludes that if these proported errors are meritorious, which the Board does not concede, they do not amount to reversible error. Therefore, the Board ORDERS that the motion for reconsideration is hereby DENIED.

DECISION DATE: April 9, 1997

VOTE: 3-0 (Laura M. Richards and Angel F. Clarens to deny, John G. Parsons to deny by absentee vote; Sheila Cross Reid and Susan Morgan Hinton not voting, not having heard the case).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY:


MADELIENE H. DOBBINS
Director

FINAL DATE OF ORDER: _____

JUN 26 1997

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

BZA APPLICATION NO. 15837
PAGE NO. 7

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

* Correction to this order is the addition of the above paragraphs.

ORD15837/twr/ljp

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 15837

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on JUN 26 1997 a copy of the order entered on that date in this matter was mailed first class, postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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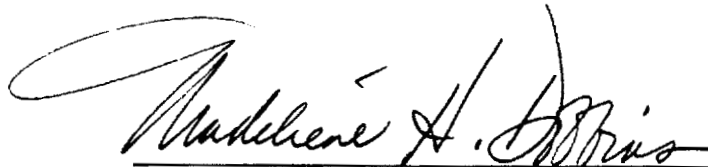
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MADELIENE H. DOBBINS
Director

DATE: JUN 26 1997